STATE OF MICHIGAN

COURT OF APPEALS

WALEED ABDULSHAFI,

Plaintiff-Appellant,

v

GENERAL MOTORS CORPORATION and IFTEKHAR IBRAHIM,

Defendants-Appellees.

UNPUBLISHED
December 16, 2003

Nos. 242061; 242858
Oakland Circuit Court
LC No. 01-031067-NZ

Before: Saad, P.J., and Markey and Meter, JJ.

PER CURIAM.

Plaintiff appeals by right an order granting defendants' motion for summary disposition and an order granting defendants' motion for case evaluation sanctions. We affirm.

Plaintiff first argues that the trial court erred in granting summary disposition on the basis of res judicata for the reason that the sexual harassment and the national origin discrimination claims arose from a different set of facts from the wrongful discharge claims against defendants which were the basis of a prior action. We disagree.

The applicability of res judicata is a question of law that is reviewed de novo on appeal. *Pierson Sand & Gravel, Inc v Keeler Brass Co,* 460 Mich 372, 379; 596 NW2d 153 (1999). Also, a trial court's grant or denial of summary disposition is reviewed de novo. *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition brought under MCR 2.116(C)(7) based on res judicata requires this Court to accept as true the well-pleaded allegations of plaintiff and to construe them in favor of plaintiff, unless specifically contradicted by the affidavits or other appropriate documentation submitted by defendant. *Adair v State of Michigan,* 250 Mich App 691, 702-703; 651 NW2d 393, lv gtd 467 Mich 920 (2002). If the pleadings indicate that defendant is entitled to judgment as a matter of law, or if the affidavits or other documentary evidence show that there is no genuine issue of material fact, judgment must be rendered without delay. *Id.*

Res judicata bars a subsequent action between the same parties when the facts or evidence essential to the action are identical to those essential to a prior action. *Sewell v Clean Cut Management, Inc,* 463 Mich 569, 575; 621 NW2d 222 (2001); *Dart v Dart,* 224 Mich App 146, 156; 568 NW2d 353 (1997), aff'd 460 Mich 573 (1999). The purposes of res judicata are to

relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and encourage reliance on adjudication. *Pierson, supra*, 460 Mich 380.

Res judicata requires that: (1) the prior action was decided on the merits; (2) the decree in the prior action was a final decision; (3) the matter contested in the second case was or could have been resolved in the first; and (4) both actions involved the same parties or their privies. *Sewell, supra*, 463 Mich 575; *Kosiel v Arrow Liquors Corp*, 446 Mich 374, 379; 521 NW2d 531 (1994). The burden of establishing the applicability of res judicata is on the party asserting it. *Baraga County v State Tax Comm*, 466 Mich 264, 269; 645 NW2d 13 (2002). Summary dispositions constitute determinations on the merits. *Capital Mortgage Corp v Coopers & Lybrand*, 142 Mich App 531, 536; 369 NW2d 922 (1985).

The test to determine whether the two actions involve the same subject is whether the facts are identical in both actions or whether the same evidence would sustain both actions. If the same facts or evidence would sustain both, the two actions are the same for the purpose of res judicata. *Huggett v DNR*, 232 Mich App 188, 197-198; 590 NW2d 747 (1998), aff'd 464 Mich 711 (2001); *VanDeventer v Michigan Nat'l Bank*, 172 Mich App 456, 464; 432 NW2d 338 (1988). If different facts or proofs would be required, res judicata does not apply. *Id.* Res judicata bars litigation in the second action not only of those claims actually litigated in the first action, but also claims arising out of the same transaction which the parties, exercising reasonable diligence, could have litigated but did not. *Sewell, supra*, 463 Mich 575; *Pierson, supra*, 460 Mich 380. A plaintiff is obligated to advance in one proceeding every alternative basis for relief, and the plaintiff's failure to do so bars relitigation of the claim. *Energy Reserves, Inc v Consumers Power Co*, 221 Mich App 210, 217; 561 NW2d 854 (1997).

The order granting defendants' motion for summary disposition in the first action is a final decision on the merits. Plaintiff points to the trial court's statement, "Plaintiff is not precluded from filing a new action," which was contained in the order granting defendants' motion for summary disposition, as establishing that the case was dismissed without prejudice. But, "summary judgment is the procedural equivalent of a trial on the merits which bars relitigation on principles of res judicata." *Capital Mortgage, supra*, 142 Mich App 536. See also *ABB Paint v National Union Fire Ins Co*, 223 Mich App 559, 563-465; 567 NW2d 456 (1997), holding summary disposition pursuant to MCR 2.116(C)(8) was a dismissal with prejudice even though the trial court stated that it is "without prejudice." Therefore, the trial court's statement in its order cannot change the fact that the order granting defendants' motion for summary disposition was a judgment on the merits to which res judicata applies.

Nor is there any dispute that both this action and the prior suit involve the same parties. The only question is whether plaintiff's allegations of sexual harassment and national origin discrimination arose out of the same transaction as that for the wrongful discharge allegation set forth in plaintiff's prior suit and whether plaintiff could have resolved these issues in the prior suit. The specific facts surrounding the three claims are different in that the wrongful discharge claim was, according to the prior complaint, based on defendant Ibrahim's statement to plaintiff

regarding job security and the employee handbook, while the sexual harassment claim arose from an incident where Ibrahim made sexual overtures to plaintiff.[1] The national origin discrimination claim arose from allegations that Ibrahim repeatedly disparaged plaintiff's heritage, i.e., Ibrahim repeatedly called him a "m----- f------ Palestinian,"[2] that upon being informed that plaintiff was born and raised in Saudi Arabia, Ibrahim told him " I hate those s--- of b------ m-----f------," that Ibrahim, who is Pakistani, favored Pakistani and Indian engineers, and that Ibrahim told plaintiff he was going to fire plaintiff because he was Palestinian. Though plaintiff alleges different facts, it is clear that each of plaintiff's claims arise from his short tenure as an employee at GM and his discharge from there in August of 1999.

The application of res judicata to this case hinges on a determination that the sexual harassment and national origin discrimination claims have their genesis in the same transaction as the claims raised in plaintiff's prior suit. *Adair, supra,* 250 Mich App 704. The test for determining whether two claims arise from the same transaction is whether the same facts or evidence is essential to the maintenance of the two actions. *Id.* In *Adair, supra,* 250 Mich App 704-705, this Court quoted 46 Am Jur 2d, Judgments, § 533, p 801, as follows:

> Whether a factual grouping constitutes a 'transaction' for purposes of res judicata is to be determined pragmatically, by considering whether the facts are related in time, space, origin or motivation, whether they form a convenient trial unit . . . .

This Court in *Adair, supra,* 250 Mich 705, also stated:

> Additionally, when applying the same transaction test, "it must be borne in mind that the number and variety of the facts alleged do not establish more than one cause of action within the rule of res judicata, as long as their result, whether they are considered severally or in combination, is a violation of but one right by a single legal wrong." *Id.,* § 534, p 803. See *Baltimore S S Co v Phillips,* 274 US 316, 321; 47 S Ct 600; 71 L Ed 1069 (1927); *Tomiyasu v Golden,* 81 Nev 140, 142-143; 400 P2d 415 (1965).

In this case, while plaintiff cites a number and variety of facts to support the wrongful discharge suit in the first action and the sexual harassment and national origin discrimination claims in the second action, they are all simply alternate theories supporting plaintiff's claim of a single wrong, i.e., plaintiff's unjust termination from his employment by GM. All of the events plaintiff alleges in support of the three claims occurred during his brief employment with GM, and all the events involved Ibrahim and his interactions with plaintiff. In short, all three claims arise from the same transaction for the purposes of res judicata.

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[1] During a car ride to Ontario for business, plaintiff alleged that Ibrahim placed his hand on plaintiff's "genital area," and subsequently "he started to use his right-hand [sic] side squeezing on my shoulder."

[2] Plaintiff was born and raised in Saudi Arabia but is of Palestinian heritage.

In addition, plaintiff knew all the facts underlying the sexual harassment and national origin discrimination claims at the time he filed the first action. Ibrahim's sexual advance occurred on April 8, 1999, well before plaintiff filed his first lawsuit against Ibrahim and GM on November 17, 1999. Not only was plaintiff aware of the incident, it is clear from an exchange which took place at plaintiff's deposition in the prior case that plaintiff considered filing a sexual harassment claim in the first suit but decided not to because he had not notified anyone at GM that Ibrahim had made a sexual overture toward him:

> *MR. HAYNES*[3]*:* Let me see, he's asking whether or not you told anybody.
>
> I think previously you had asked a question whether or not he had told anybody in reference to GM and his answer was no. As a matter of fact, there is nothing in the Complaint that alleges sexual harassment or that particular incident and there's a specific reason for that and the reason for that is that, as he indicated to you in the deposition, he told no one at GM, and so GM could not do anything about it anyway because he had not told them.
>
> *MR. PAGE*[4]*:* I believe he testified that he told someone who was working over there.
>
> *THE WITNESS:* Yes.
>
> *MR. PAGE:* That was my question, working at General Motors, and that, I think that's very, very relevant. If he's claiming this happened and he told people at GM about it, I think I'm entitled to know who the told at GM about it.
>
> *MR. HAYNES:* Did you tell someone at GM about it?
>
> *THE WITNESS:* Yes, but not an official GM [sic], somebody who is working at GM.

So as early as May 25, 2000, the date of plaintiff's deposition, plaintiff considered filing a sexual harassment claim as an alternative theory for his wrongful discharge.

Plaintiff also could have filed his national origin discrimination claim at the same time he filed his first action. Plaintiff argues in his brief on appeal that he could not have brought an action for national origin discrimination before the deposition of the human resources representative because he did not learn that the representative kept notes of interviews of GM employees which contained information that Ibrahim favored people from his own culture until the deposition. But all of the actions plaintiff asserted in support of his national origin

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[3] Haynes is plaintiff's counsel.

[4] Page is defendants' counsel.

discrimination claim as listed *supra*, occurred in plaintiff's presence before his termination from GM, and, according to plaintiff, with respect to the national origin discrimination claim, before witnesses. Therefore, no valid reason exists for plaintiff's not bringing the national origin discrimination claim at the time he filed the first complaint. The fact that there was additional evidence supporting his claim in the interview notes does not excuse plaintiff's failure to plead national origin discrimination when he knew of both the statements and the witnesses supporting the charge.

Because the wrongful discharge claim in the prior action, and the sexual harassment and national origin discrimination claims in this suit arose from the same transaction, and because plaintiff could have brought the sexual harassment and national origin discrimination claims in the prior action, the trial court did not err in finding that the doctrine of res judicata barred plaintiff from pursuing his claims for sexual harassment and national origin discrimination.

Plaintiff next argues that the trial court did not have jurisdiction to award case evaluation sanctions to defendants where an appeal from the final order was pending in this Court. We disagree.

Whether the trial court has jurisdiction to award case evaluation sanctions during the pendency of an appeal involves the interpretation of a court rule that is subject to de novo review on appeal. *St George Greek Orthodox Church of Southgate, Mich v Laupmanis Assocs, PC,* 204 Mich App 278, 282; 514 NW2d 516 (1994).

Plaintiff relies on *Co-Jo, Inc, v Strand*, 226 Mich App 108; 572 NW2d 251 (1997), for the proposition that a trial court cannot award case evaluation sanctions once an appeal has been taken from a final order in the case. In *Co-Jo, supra*, the trial court entered an order awarding costs and attorney fees to the defendant after a jury verdict of no cause of action and after the plaintiff filed a claim of appeal from the judgment. This Court held that the trial court was without jurisdiction to award costs and fees once the appeal had been filed and cited MCR 7.208(A) which provided that once a claim of appeal was filed, a trial court could not amend or set aside the judgment or order appealed from except pursuant to an order of this Court, by a stipulation of the parties, or as otherwise provided by law. *Id.*, 118. This Court stated that because the judgment in the case did not express an intention to grant costs and attorney fees, the trial court was without jurisdiction to grant them. *Id.*, 119.

MCR 7.208 was amended subsequent to the holding in *Co-Jo, supra*, 226 Mich App 118, to include subsection (I), which provides:

> The trial court may rule on requests for costs or attorney fees under MCR 2.403, 2.405, 2.625 or other law or court rule, unless the Court of Appeals rules otherwise.

The Staff Comment to subsection (I) makes clear that the change was implemented to allow the trial court to award sanctions regardless of whether an appeal was pending:

> The amendments to MCR 7.203 and MCR 7.208 [effective February 1, 2000,] deal with two issues regarding the relationship of appeals and orders awarding or denying attorney fees and costs.
>
> One amendment concerns the authority of the trial court to rule on requests for sanctions when an appeal has been taken. See *Co-Jo, Inc v Strand*, 226 Mich App 108 (1997). New MCR 7.208(I) provides that the trial court has the authority to rule on such requests despite the pendency of an appeal.

As defendants' motion for case evaluation sanctions was filed on June 20, 2002, after the effective date of the amendment to MCR 7.208, the trial court had jurisdiction to award case evaluation sanctions.

We affirm.

/s/ Henry William Saad
/s/ Jane E. Markey
/s/ Patrick M. Meter